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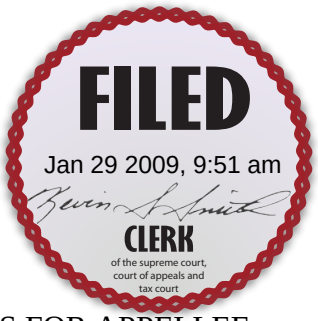

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IN THE
COURT OF APPEALS OF INDIANA

JERRY D. JOHNSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0805-CR-293
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0702-FA-8

January 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Jerry D. Johnson appeals his convictions for class A felony possession of cocaine with intent to deliver, class D felony maintaining a common nuisance, and class A misdemeanor marijuana possession. The sole issue is whether the trial court committed fundamental error by admitting evidence recovered during a search of Johnson's house. We affirm.

After midnight on February 25, 2007, Amber Hubbard was alone at the home she shared with her boyfriend, Johnson, who was the sole lessee. She heard a window break and saw someone entering through a back window. She ran out the front door to her neighbor's house to phone the police. When the police arrived, Hubbard told them that the intruders were still inside the house, and officers searched the house. Outside, they found a broken window by the back door and footprints in the snow leading to the window. On the kitchen counter, they observed a bag containing a white, rock-like substance. When they entered the living room, they smelled marijuana and observed an open cigar and a green, leafy substance on the coffee table. In an upstairs bedroom, they observed a semi-automatic rifle between the bed and the wall.

When they confirmed that the intruders were no longer in the house, the officers brought Hubbard inside. After they advised Hubbard of her rights, she signed a waiver of consent to give a statement to the officers and gave verbal consent to a search of the premises. She told the officers that she had lived in the house with Johnson for about two months, and the officers observed mail addressed to her there.

One officer found a handgun and shells in a hall closet. In a bedroom closet, an officer found a duffel bag containing $25,000 in cash and a box containing DVDs and a bag

of a powdery substance later determined to be cocaine. In the kitchen, officers found a box containing a scale. As the officers prepared to leave, Johnson returned home, and the officers arrested him.

On February 28, 2007, the State charged Johnson with class A felony possession of cocaine weighing three grams or more with intent to deliver, class D felony maintaining a common nuisance, and class A misdemeanor marijuana possession. On March 18, 2007, a jury found him guilty as charged.

On appeal, Johnson claims that the trial court erred in admitting evidence recovered during the search of his home. To preserve error for review, the defendant must make a specific and timely objection to the admission of the evidence. *Tate v. State*, 835 N.E.2d 499, 505 (Ind. Ct. App. 2005), *trans. denied*. Johnson admits that he did not object to the admission of the evidence, but he now claims that it was fundamental error for the trial court to admit such evidence. "Fundamental error is a substantial, blatant violation of basic principles rendering the trial unfair and depriving the defendant of fundamental due process." *Id*. "To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." *Id*. (citation and quotation marks omitted). The fundamental error exception is very narrowly applied and, as such, will be available only in cases where the record indicates a blatant due process violation involving the undeniable potential for harm. *Id*.

Johnson challenges the legality of the officers' warrantless search of his home. The purpose of the Fourth Amendment to the United States Constitution is "to protect the

legitimate expectations of privacy that citizens possess in their persons, their homes and their belongings." *Norris v. State*, 732 N.E.2d 186, 188 (Ind. Ct. App. 2000) (citation and quotation marks omitted). "Searches and seizures conducted inside a person's home without a warrant are presumed to be unreasonable under the Fourth Amendment." *Tate*, 835 N.E.2d at 505. Therefore, when police conduct such a search, the burden is placed on the State to prove that an exception to the warrant requirement existed at the time of the search. *Id*. "Because it is undoubtedly reasonable for the police to conduct a search once they have been permitted to do so, a consensual search is a well-established exception to the warrant requirement." *Norris*, 732 N.E.2d at 188.

Johnson contends that, because police obtained Hubbard's consent rather than his consent, the search was illegal. "A valid consent to a search may be given by either the person whose property is to be searched or by a third party who has common authority over or a sufficient relationship to the premises to be searched." *Id*. This means that the State must show a mutual use of the property by persons generally having joint access or control for most purposes. *Livermore v. State*, 777 N.E.2d 1154, 1158 (Ind. Ct. App. 2000). If such actual authority cannot be established, then the State must prove that the consenting party had apparent authority to consent to the search. *Krise v. State*, 746 N.E.2d 957, 967 (Ind. 2001). "Under the apparent authority doctrine, a search is lawful if the facts available to the officer at the time would warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Id*. (citation and internal quotation marks omitted).

Here, although the property was leased solely in Johnson's name, Hubbard had mutual

use of and a sufficient relationship to the premises to warrant the officers' reasonable belief in her apparent authority to consent to its search. Hubbard told police that she had been living in the home with Johnson for two months. Moreover, officers found mail addressed to her at that residence.

Finally, Johnson challenges the scope of the search. Specifically, he alleges that the duffel bag containing $25,000 and the box containing a bag of cocaine were closed, personal containers over which he alone had a reasonable expectation of privacy. When faced with the issue of consent to search closed containers, in *Krise*, our supreme court opined:

> Rather than considering a third-party's authority to consent to the general search of the home as "all encompassing" to the search of every container found inside the home, we hold that the inspection of closed containers that normally hold highly personal items requires the consent of the owner or a third party who has authority—actual or apparent—to give consent to the search of the container itself.
>
> In reaching this conclusion, we find that the *type* of container is of great importance in reviewing third-party consent search cases.

Id. at 969 (emphasis added). In *Krise*, the closed container was the female defendant's purse found in the bathroom at her residence. Our supreme court held that it was unreasonable for officers to believe that Krise's cohabiting boyfriend had the requisite authority to consent specifically to the search of her purse. There, the officers testified that at the time of the search they knew that the handbag was a woman's purse and that Krise was the only woman living in the house. *Id*. at 971. The *Krise* court also emphasized societal acceptance of the legitimate expectation of a purse-owner's privacy based on the highly personal nature of items often stored in that type of container. *Id*. at 970.

In contrast, here, the type and location of the containers support the reasonableness of

the officers' belief in Hubbard's apparent authority to consent to their search. Unlike the woman's purse in *Krise*, neither the duffel bag nor the box was gender-specific. Moreover each was less likely than a purse to contain highly personal items. Finally, Johnson and Hubbard were boyfriend and girlfriend, thus leading a reasonable observer to conclude that they shared the bedroom and the closet as a couple.

In sum, we find no error, fundamental or otherwise, in the admission of evidence recovered during the search of Johnson's home. Accordingly, we affirm his convictions.

Affirmed.

ROBB, J., and BROWN, J., concur.